

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg  
MOTORS LIQUIDATION COMPANY, . Chapter 11  
et al., f/k/a GENERAL . (Jointly administered)  
MOTORS CORP., et al, .  
Debtors. . One Bowling Green  
New York, NY 10004  
Tuesday, March 5, 2019  
9:43 a.m.

TRANSCRIPT OF MOTION TO ALLOW INCLUSION OF THE TONAWANDA FORGE  
SITE IN THE RACER TRUST, OR IN THE ALTERNATIVE, FOR AUTHORITY  
TO FILE A LATE CLAIM AGAINST THE DEBTORS TO PARTICIPATE IN  
DISTRIBUTIONS FROM THE GUC TRUST(DOC. NO. 14392, 14393)

**BEFORE THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES:

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Holdings, Inc. and its  
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1 (Proceedings commence at 9:43 a.m.)

2 THE CLERK: All rise.

3 THE COURT: All right. Please be seated. We're here  
4 in Motors Liquidation Company, 09-50026. This is a motion in  
5 connection with the Tonawanda Forge site. Let me have the  
6 appearances, please. First, the moving party.

7 MR. STRAVINO: Good morning, Your Honor. Jeff  
8 Stravino from Hodgson Russ on behalf of American Axle, and I  
9 have with me my partner, Jim Thoman from Hodgson Russ --

10 THE COURT: Thank you.

11 MR. STRAVINO: -- on behalf of American Axle.

12 THE COURT: Thank you.

13 MS. ERBECK: Good morning, Your Honor. Marita  
14 Erbeck, Drinker, Biddle & Reath, on behalf of the GUC Trust.

15 MR. JONES: And good morning, Your Honor. David  
16 Jones from the U.S. Attorney's Office, Southern District of New  
17 York, for the United States.

18 MR. BLUMENTHAL: Morning, Your Honor. Michael  
19 Blumenthal from Thompson & Knight on behalf of the RACER Trust.

20 THE COURT: All right. Go ahead, Counsel.

21 MR. STRAVINO: Good morning, Your Honor. We're here  
22 today, American Axle's motion to include the former Tonawanda  
23 Forge site in the RACER Trust, which was created approximately  
24 eight years ago, back in March 2011. The reason for the  
25 request is that recently, the State of New York has contacted



1 American Axle to -- about environmental contamination that  
2 currently exists at the site and has not sent a formal PRP  
3 letter --

4 THE COURT: American Axle has known about the  
5 contamination since it acquired the property, correct, because  
6 Old GM disclosed it to it.

7 MR. STRAVINO: Correct, Your Honor.

8 THE COURT: Go ahead.

9 MR. STRAVINO: Yes, they did. And --

10 THE COURT: What year -- they acquired it in what  
11 year, 1990 --

12 MR. STRAVINO: In 1994, Your Honor.

13 THE COURT: Go ahead.

14 MR. STRAVINO: And for ten years, at least, GM was  
15 cleaning up that property and cleaning up the PCBs that had  
16 been in the, you know, on the property. I think the relevant  
17 issue, just to cut to the chase, is that when GM filed for  
18 bankruptcy -- and American Axle sold the property in late 2008.  
19 The closing occurred in early 2009. The property is currently  
20 owned by the Lewis Brothers. We understand that the Lewis  
21 Brothers are a defunct, non-operating Virginia LLC.

22 GM files for bankruptcy on June 1st, 2009. The proof  
23 of claim bar date was November 30th, 2009. The other --

24 THE COURT: And American Axle received notice of the  
25 filing of the case, received notice of the bar date, correct?



1 MR. STRAVINO: Yes, we did, Your Honor. We're not  
2 disputing that at all. And the RACER Trust was created in  
3 March 2011.

4 THE COURT: For 89 properties that Old GM owned at  
5 the time of the bankruptcy, correct?

6 MR. STRAVINO: Mainly correct, except, Your Honor,  
7 there were another property, at least we know, or part, that  
8 was not owned by Old GM at that time but was adjacent or  
9 contiguous, but where Old GM was the sole PRP.

10 THE COURT: Right. And none of the 89 properties had  
11 been disposed of by Old GM between 1994, when it sold Tonawanda  
12 to American Axle, and up to the time of the bankruptcy,  
13 correct? I mean, you're dealing with a very old --

14 MR. STRAVINO: Almost.

15 THE COURT: -- very old property, and the RACER Trust  
16 was established to deal with environmental contamination at  
17 properties that GM owned. You say one of them was adjacent to  
18 a property it owned at the time of the bankruptcy on June 1st,  
19 2009, correct?

20 MR. STRAVINO: Right. So, Your Honor, it's not,  
21 though, that no property -- it's not that every single property  
22 or every single parcel that was part of the RACER Trust --

23 THE COURT: It specifically identified and included  
24 89 properties, and it had various provisions about -- that  
25 resolved potential environmental liability claims against



1 Old GM. These were -- none of the 90 properties were acquired  
2 by New GM as part of the bankruptcy sale, correct?

3 MR. STRAVINO: Correct. And the Tonawanda Forge site  
4 was not acquired by New GM, correct.

5 THE COURT: Well, New GM hadn't owned it since 1994.  
6 It would have been very hard for the -- for all of -- for New  
7 GM to acquire it from Old GM.

8 MR. STRAVINO: Right. But at the end of the day,  
9 Your Honor, we're talking about -- so I think the key  
10 distinguishing factor here is we're talking about CERCLA  
11 claims. And CERCLA claims right now, arguably, are not ripe  
12 for American Axle because we have not incurred any response  
13 costs. That being said, when would we become knowledgeable,  
14 potentially, about a CERCLA claim, and it's only since the  
15 State of New York provided us with this notice.

16 Also, Your Honor, I think it's relevant that the  
17 State of New York, when they filed proofs of claim in this  
18 case, they filed 21 of them. And none -- they included other  
19 sites across New York State, but they did not include the  
20 Tonawanda Forge site. So I think it's unfair and would be very  
21 difficult and improper and inequitable to say, American Axle,  
22 you should have known back in -- on June 1st, 2009, you should  
23 have known that on March 31st, 2011, that there's some  
24 potential environmental issue at this site and that you would  
25 have a CERCLA claim.



1 THE COURT: This isn't in the record of anything that  
2 I've read in connection with the motion, but has American Axle  
3 been identified as a PRP in connection with any other  
4 properties that it owned at any time in the past?

5 MR. STRAVINO: Yes, Your Honor.

6 THE COURT: And at how many properties?

7 MR. STRAVINO: I don't know the answer to that, Your  
8 Honor.

9 THE COURT: And going back how -- how far back in  
10 time was American Axle identified as a PRP with respect to  
11 properties -- you don't have to own the property to be  
12 identified as a PRP, correct?

13 MR. STRAVINO: Correct. You --

14 THE COURT: Sometime in the past, you allegedly owned  
15 the property and there was some --

16 MR. STRAVINO: Or operated --

17 THE COURT: Owned or operated.

18 MR. STRAVINO: -- owned or operated normally, Your  
19 Honor, yes.

20 THE COURT: And so do you know this -- again, this is  
21 not in the record of the motions before me, but do you know how  
22 many properties American Axle was identified as a PRP?

23 MR. STRAVINO: I do not, Your Honor. I'm frankly  
24 representing American Axle with respect to this site. I do know  
25 of another site --



1 THE COURT: They're not a stranger to issues of  
2 environmental contamination.

3 MR. STRAVINO: No, they're not, Your Honor. But on  
4 the other hand, they're also not --

5 THE COURT: And the potential liability, CERCLA or  
6 state parallels that -- potential liability where they owned  
7 the property at the time the contamination is identified or  
8 owned or operated it sometime in the past, and both state and  
9 federal environmental laws make such parties as PRPs, correct?

10 MR. STRAVINO: Correct, Your Honor, although what I  
11 would say there is then does that mean -- and if that's the  
12 rule, that's the rule that Your Honor will have -- that every  
13 single GM site in the U.S., any party that ever owned or  
14 operated on any of those sites should have filed a proof of  
15 claim? And I don't think that's --

16 THE COURT: Whether they should have or not is not fo  
17 me to determine. They haven't, but -- let me ask you another  
18 question. I saw in the sale documents to American Axle, there  
19 was disclosure of the PCB and other possible contamination, and  
20 American Axle released Old GM from liability for it. Is that  
21 correct?

22 MR. STRAVINO: Well, Your Honor, there was a -- there  
23 were different indemnities that were in there and different  
24 provisions, and depending on the type of problem and whether it  
25 was something that had been disclosed before or after the sale





1 and GM was responsible for cleaning up. And I think the key  
2 point there is, Your Honor, as of 2004, upon information and  
3 belief, American Axle, from everything we know, had been told  
4 and seen in documents, never notified GM to say, you still need  
5 to do some further cleanup. New York State never notified GM  
6 to say, you should do further cleanup.

7           So in 2009 when the bankruptcy was filed, again, New  
8 York State filed 21 proofs of claim. They didn't file with  
9 respect to the site. They filed with a bunch of other sites.  
10 Nobody knew or -- it wasn't within the reasonable contemplation  
11 of the parties. It was not expected that there would be an  
12 environmental issue with this site.

13           So that's the point. That's why all these years  
14 later, and frankly, that's why the State's letter and notice to  
15 American Axle didn't just come out left field, it seemed to  
16 come from another planet. And -- but we do not believe that  
17 it's --

18           THE COURT: I've heard that before with respect to  
19 environmental contamination and potential PRP responsibility.  
20 Everybody is shocked that this has suddenly gotten this notice.  
21 There's been no determination of American Axle's responsibility  
22 with respect to Tonawanda, correct?

23           MR. STRAVINO: No, there hasn't, Your Honor.

24           THE COURT: All right.

25           MR. STRAVINO: And that being said, maybe if other



1 parties arguing and there's been a bunch of other cases cited,  
2 but I think, for example, if you look back to In re Chateaugay  
3 from the Second Circuit in 1991, there, the Environmental  
4 Protection Agency had already incurred some response costs.  
5 Here, no response costs have been incurred.

6           If you look at the different cases also that we cited  
7 on Page 6 of our reply papers -- and, for example, the Laidlaw  
8 case from the Western District of New York, the Chicago  
9 Milwaukee Railroad case, AM Intern. Basically in Chicago  
10 Milwaukee, the Court -- it's, granted, the Seventh Circuit, but  
11 they had canvassed case law on the issue and determined that  
12 creditors whose claims have arisen when they knew they had a  
13 potential CERCLA claim before the close of the bankruptcy  
14 proceedings. Here, we did not know we had a potential CERCLA  
15 claim.

16           THE COURT: The purchase agreement disclosed -- in  
17 1994 disclosed contamination by PCBs and other possible  
18 contaminants. This came as no surprise to American Axle. They  
19 knew it when they bought the property, correct?

20           MR. STRAVINO: They knew that there were PCBs at the  
21 site when they bought the property. Correct, Your Honor. But  
22 if this -- if GM files for bankruptcy in 1997, we'd be in a  
23 different situation. If GM files for bankruptcy in 2002, we'd  
24 be in a different situation. If GM --

25           THE COURT: You thought you were home-free. I Mean,



1 that's --

2 MR. STRAVINO: Right. We thought because of when GM  
3 files for bankruptcy, because there were no issues that we  
4 understood at the site with GM or with the State, that --

5 THE COURT: Do you understand what the concept of  
6 contingent claims means --

7 MR. STRAVINO: Yes, I do, Your Honor.

8 THE COURT: -- in bankruptcy? And don't you agree  
9 that with respect to contamination that existed in the property  
10 at the time American Axle acquired the property, that it had a  
11 contingent claim that it could assert?

12 MR. STRAVINO: No, I don't, Your Honor.

13 THE COURT: Why not?

14 MR. STRAVINO: Because the contingent claim is not  
15 the fact that the contamination existed. The contingent claim  
16 is the fact you had a CERCLA or some other cause of action,  
17 which American Axle did not have on June 1st, 2009.

18 THE COURT: Doesn't have to be a cause of action  
19 asserted. I mean, if you look at the whole line of products  
20 liability cases, the issue is whether American Axle had a  
21 contingent claim, knowing that the property was contaminated  
22 with PCBs, potentially other contaminants, at the time it  
23 purchased the property. That, you can't dispute. It's in the  
24 purchase agreement. By 1994, had PCBs been identified as  
25 really bad contamination for which property would -- might well



1 have to be remediated, depending on concentrations and whether  
2 it's in the groundwater and the direction it's flowing? You  
3 agree with that?

4 MR. STRAVINO: Yes, I do, Your Honor.

5 THE COURT: Okay. So they knew the property was  
6 contaminated with PCBs. They knew PCBs were a really bad  
7 contaminant and potentially could be -- lead to remediation  
8 costs, correct?

9 MR. STRAVINO: At the time in 1994, yes, Your Honor.

10 THE COURT: Okay.

11 MR. STRAVINO: And in 2009 --

12 THE COURT: And you're saying those circumstances  
13 didn't give rise to a contingent claim as those terms have been  
14 well-developed in bankruptcy case law?

15 MR. STRAVINO: Well, Your Honor, I think that we have  
16 to slice the salami a little thinner or get down and break it  
17 down. I had a law school professor I loved who said if you  
18 don't understand, you know, a paragraph, break it down by the  
19 sentence; the sentence, break it down by the phrase; phrase by  
20 the word. And I think you have to focus on environmental case  
21 law in bankruptcy and contingency. And there's the DMJ  
22 Associates case from the Eastern District of New York from 2016  
23 that we cited where the court had rejected a debtors' argument  
24 that the occurrence in discovery of environmental contamination  
25 prior to the filing of the debtor's bankruptcy petition



1 discharged CERCLA claims against it. And I believe, Your  
2 Honor, the key is we're talking about CERCLA here. Otherwise,  
3 again, as I said, then the law wouldn't just be in the GM case,  
4 but anywhere, that if there was a --

5 THE COURT: Chateaugay and subsequent case law in  
6 this circuit and elsewhere distinguishes between liability or  
7 cleanup costs for contamination within a property which can be  
8 discharged and liability for preventing continuing pollution on  
9 adjacent properties, things like that. That's -- you agree  
10 with that? I mean, there's a difference. You can -- you may  
11 be able to discharge what the cleanup costs were on -- within  
12 the four corners of this property. The problem that can't be  
13 discharged -- liability can't be discharged if the  
14 contamination is crossing the -- continuing to cross the  
15 boundaries, contaminate water wells on adjacent properties, and  
16 an injunction is issued requiring PRPs to avoid that ongoing  
17 contamination. That's not dischargeable. You agree with that?

18 MR. STRAVINO: Yes, Your Honor. But I don't know if  
19 that's the case -- I don't believe that's the case here. I  
20 don't think we're talking about --

21 THE COURT: You don't know because there hasn't been  
22 -- the state hasn't, at this stage, made clear to American Axle  
23 whether it -- whether the State believes it is responsible for  
24 remediation costs or not. They put you on notice -- put your  
25 client on notice of the potential liability that they may



1 assert. They haven't asserted it so far. Correct?

2 MR. STRAVINO: Well, two things, Your Honor. One,  
3 with respect to the offsite argument, I believe what's in the  
4 record and what's public record from the DEC report and the DEC  
5 ruling, my understanding is that because it's still -- there is  
6 a GM Powertrain site adjacent to the former Tonawanda Forge  
7 site and that --

8 THE COURT: That New GM is operating?

9 MR. STRAVINO: Correct ,yeah. And my understanding  
10 is that there had been environmental work and barriers and  
11 other remedial work done to ensure that there was not any type  
12 of flow of contamination across that property. The GM  
13 Powertrain site basically sits on the Niagara River in Buffalo.  
14 There's the 190 there, and I think the concern is to prevent  
15 that from going into the water. The American Axle site is  
16 behind it.

17 And so that was all done, and that was all taken care  
18 of before 2004, before 2009, before 2011. So again,  
19 preventative measures, remedial measures were taken. That's  
20 where I think the facts here are key and distinguish from many  
21 of the other, you know, general premises that we're talking  
22 about.

23 So the fact -- you know, for example, if a party  
24 spilled had a -- knew that a gallon of gasoline or ten gallons  
25 of gasoline were spilled onsite at one point, does that mean



1 that they should then -- and they were an owner of a site 30  
2 years later, get a notice of some bankruptcy that they should  
3 be filing a proof of claim with respect to that? I don't --  
4 that, to me, seems like a problematic argument. I know in --

5 THE COURT: Is that what happened here? They spilled  
6 a gallon of PCBs and that was the only contamination on the  
7 property?

8 MR. STRAVINO: No. It was -- well, we believe it was  
9 -- we understand it's more than that, but --

10 THE COURT: Then don't give me that as a  
11 hypothetical.

12 MR. STRAVINO: Understood, but if you think it's  
13 cleaned up and that there aren't that many PCBs still there at  
14 the time, then -- and the State doesn't say that it's not clean  
15 up -- cleaned up, then why should you have to -- so I guess  
16 maybe I was wrong with my analogy or my example, but if you  
17 believe something's been cleaned up properly and nobody's  
18 asserting a claim, none of the regulatory agencies -- we don't  
19 believe EPA's asserted a claim. We couldn't find exactly  
20 everything with respect to EPA, but New York State, again,  
21 filed 21 proofs of claim, some other ones in Western New York.  
22 If they really thought this was a problem, they would have  
23 asserted a claim there.

24 So that's our problem, Your Honor, respectfully why  
25 we think that this is distinguishable, why we think it's



1 inequitable if we aren't included in the RACER Trust.

2 THE COURT: Well, spell out for me how you think, in  
3 2019, Tonawanda can be added to one of the properties in -- to  
4 add to the 89 properties in the RACER Trust, all of which were  
5 either owned or operated or, you said, adjacent to properties  
6 that Old GM was operating at the time of the bankruptcy.  
7 That's -- I don't follow, okay? I thought that Mr. Jones's  
8 argument was quite persuasive on the issue of you can't come  
9 back in 2019 and add -- and modify a heavily negotiated  
10 agreement that established the RACER Trust only as to 89  
11 properties. Lay that out for me.

12 MR. STRAVINO: Well, Your Honor, I think that consent  
13 orders and agreements can be amended, and there's case law that  
14 allows the amendment.

15 THE COURT: You're not a party to the consent order.

16 MR. STRAVINO: Right.

17 THE COURT: You're -- I don't see how you have  
18 standing to even seek a modification of a heavily negotiated,  
19 court-entered order that dealt with 89 properties that Old GM  
20 owned or operated at the time of the bankruptcy. Do you have  
21 any -- let me ask you this. Do you have -- what's your case  
22 authority to support modifying the court orders that  
23 established the RACER Trust for the 89 properties to add a  
24 property that Old GM had sold in 1994? What's your authority?

25 MR. STRAVINO: Your Honor, we believe Federal Rule





1 60(b) allows standing on non-parties like American Axle, and we  
2 cited Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044  
3 (2d. Cir. 1982) for a holding that non-parties had standing to  
4 modify a judgment where non-parties were sufficiently connected  
5 with the initial lawsuit.

6 THE COURT: How are you sufficiently connected to an  
7 order that dealt with 89 specific properties, not including  
8 this one, and established a mechanism to deal with  
9 environmental liability, how it would be -- remediation would  
10 be compensated or paid for for 89 specific properties? That, I  
11 don't see.

12 MR. STRAVINO: Well, Your Honor, our understanding  
13 and my interpretation and reading of the case law is that the  
14 Grace v. Leumi Second Circuit case from 2006 had applied the  
15 standard in Dunlop and determined that a party had standing,  
16 and the key determination in that case and the lines of case  
17 that they cited was whether the non-parties' interests are  
18 strongly affected by a legal instrument --

19 THE COURT: Your clients' interest are not affected  
20 whatsoever by the 89 properties included in the RACER Trust,  
21 correct? You don't -- the -- how -- would you agree with that?

22 MR. STRAVINO: Well, Your Honor, I would respond this  
23 way. Six-hundred-plus-million dollars was put in the RACER  
24 Trust to clean up former GM or current GM properties.

25 THE COURT: Eighty-nine specific properties, not



1 including Tonawanda that had been sold in 1994.

2 MR. STRAVINO: And then, I respond to that with why  
3 wasn't Tonawanda included, because nobody at the time thought  
4 that it -- there was a contamination issue there. The EPA  
5 didn't. The State didn't. American Axle didn't. Current  
6 owners at the time presumably didn't. I can't speak for them,  
7 Lewis Brothers, and to the other parties. So I can't disagree,  
8 Your Honor, it wasn't included back then. So -- but we do  
9 think that our interest is greatly affected, and we also think  
10 that given the amount of money that was put in the trust, now  
11 it's going to be eight years ago later this money and the  
12 amount that still remains and the --

13 THE COURT: How much still remains?

14 MR. STRAVINO: I believe it's in a few hundred  
15 million dollars. I'm not sure that's -- but that including  
16 this one additional property for fairness --

17 THE COURT: You think if this one's added that there  
18 won't be a dozen or more motions made to include properties  
19 that Old GM owned at some distant time in the past to add them  
20 to the RACER Trust? See what you did as to Tonawanda, Judge?

21 MR. STRAVINO: I understand that argument, but we're  
22 now eight years past the formation of RACER.

23 THE COURT: Why don't you move on to your argument  
24 about leave to file late claim.

25 MR. STRAVINO: Okay. Well, Your Honor, we



1 respectfully request that contrary to the -- I guess that we  
2 already argued this a little bit, but contrary to the GUC Trust  
3 position, we do not believe that our claim did exist prior to  
4 the bar date in November 30, 2009. And if that's what Your  
5 Honor was asking -- are you talking about the --

6 THE COURT: Well, if it didn't exist prior to the bar  
7 date, you can't assert a late claim against Old GM in its  
8 bankruptcy.

9 MR. STRAVINO: Well --

10 THE COURT: Isn't that true?

11 MR. STRAVINO: It --

12 THE COURT: If it didn't have a contingent claim as  
13 of the petition date on June 1, 2009, American Axle can't  
14 assert a claim against the GUC Trust standing in for Old GM,  
15 correct?

16 MR. STRAVINO: Perhaps, Your Honor, that's not --

17 THE COURT: Can you answer that yes or no?

18 MR. STRAVINO: I guess the answer -- I don't want to  
19 give you a yes or no answer --

20 THE COURT: Well, I know that.

21 MR. STRAVINO: -- because I know you're saying --

22 THE COURT: That's pretty obvious.

23 MR. STRAVINO: It's --

24 THE COURT: But you do have to answer my question.

25 MR. STRAVINO: -- what's the definition of a claim,



1 what's the definition of a claim.

2 THE COURT: Well, you said it didn't have a claim as  
3 of June 1, 2009, the petition date. If it didn't have a claim  
4 as of the petition date, it couldn't assert the claim, timely  
5 or untimely, in Old GM's bankruptcy, correct?

6 MR. STRAVINO: Well, here's my concern why I don't  
7 want to --

8 THE COURT: Can you answer my question yes or no?

9 MR. STRAVINO: I'm going to say no, Your Honor.

10 THE COURT: Okay. Tell me why.

11 MR. STRAVINO: Because I believe with, for example,  
12 ignition plaintiffs who perhaps didn't know at that time that  
13 they had a claim, and then later on, there was a problem with  
14 the car or --

15 THE COURT: The Second Circuit held in the Elliott  
16 case that the ignition switch defect was a known defect, known  
17 to Old GM, not disclosed by Old GM, disclosed for the first  
18 time in 2014 when New GM issued recalls. The opinion recounts  
19 -- and there was an investigation about it -- recounts Old GM's  
20 knowledge about the ignition switch defect, the failure to  
21 disclose it. It's completely distinguishable from American  
22 Axle, where it knew about PCB contamination because Old GM  
23 disclosed it in the sale agreement, okay.

24 MR. STRAVINO: So -- but if then, I guess, the  
25 contamination existed, I don't think that, in 2009, provided



1 the basis for a claim, a CERCLA claim, but there were the  
2 underlying -- you know, what Your Honor said before. I'm not  
3 trying to argue against what I said before.

4 THE COURT: You say a CERCLA claim, but there could  
5 be state law nuisance claims. There could be a whole host of  
6 potential claims arising from environmental contamination on  
7 property, not just CERCLA liability. States all have their own  
8 versions of the CERCLA statute. There's common law liability  
9 in many states for nuisance. There's a whole host of claims.

10 MR. STRAVINO: But Your --

11 THE COURT: So just deal with the issue of why you  
12 believe American Axle should be permitted to file a late claim  
13 now. You started by -- in answering my question talking about  
14 future claims. Well, future claims don't cut it because you  
15 wouldn't be able to file a proof of claim if a contingent claim  
16 didn't exist as of the petition date. Agreed?

17 MR. STRAVINO: Agreed, Your Honor. But I think -- I  
18 guess I'll go with our final argument that we had made in our  
19 papers, where we said that if American Axle's claim is not a  
20 prepetition claim, it is not futile nor is it barred by  
21 11 U.S.C. 502(e)(1)(B). And there -- and this was at the end  
22 of our reply papers that we briefly addressed, but in the  
23 context of environmental liability, our understanding from  
24 precedent is that 502(e)(1)(B) won't bar a private creditor's  
25 claim or the relevant government agency does not file a claim



1 against the debtor.

2 And so at the time of the bar date, as well as --  
3 well, at the time of the bankruptcy, at the time of the bar  
4 date, there had been no government claims against the debtor.  
5 There had been no private party claim against the debtor. And  
6 so we believe that because New York hadn't filed a claim, that  
7 there was no co-liability element and therefore it's not  
8 present here.

9 THE COURT: Okay. I (indiscernible). Thank you.

10 MR. STRAVINO: Okay.

11 THE COURT: Let me hear from the GUC Trust next.

12 MS. ERBECK: Good morning, Your Honor. Marita  
13 Erbeck, Drinker, Biddle & Reath, on behalf of the GUC Trust. I  
14 don't think anything that we've heard today really changes what  
15 we've articulated in our papers and changes the fact that there  
16 was sort of a classic contingent claim that existed as of the  
17 bar date. I'm going to just sort of hit on a few points. I  
18 won't sort of rehash everything that's in our papers.

19 You know, the Court sort of picked up on one of the  
20 main themes of, I think, our papers and, you know, what I  
21 intended for the presentation to be here today, and that's that  
22 American Axle had notice of the environmental contamination as  
23 early as 1994, rather, and also had actual notice of the  
24 bankruptcy, the bar date. Usually in late claim motions like  
25 this, we're sort of arguing about whether someone's an unknown



1 creditor, whether we can sort of loop them in using publication  
2 notice, but here, we sort of have the rare case of actual  
3 notice of the bankruptcy and the bar date, and I think those  
4 things are ally important to keep in mind.

5 Just with respect to, you know, whether or not a  
6 contingent claim existed, I think this is sort of your classic  
7 contingent claim. Section 1055(a) of the Code is broad and is  
8 broad by design. It expressly includes contingent claims, and  
9 those contingent claims are claims that are dependent on  
10 something that may or may not happen in the future here.

11 THE COURT: Like New York finally coming around and  
12 saying clean it up.

13 MS. ERBECK: Hey, you might be -- you might have to  
14 pay. That's exactly right. You know, sort of the basis of the  
15 claim, the foundation of the claim, is the contamination  
16 itself. And so to answer the question that Your Honor was  
17 asking counsel for American Axle, you know, does this mean --  
18 or the hypo that he presented, does this mean that everybody --  
19 every, you know, owner or operator of every property that was  
20 ever owned by Old GM had to -- would have to file a proof of  
21 claim? If they want to seek recovery or reimbursement for  
22 environmental cleanup costs, the answer to that question is  
23 yes, right? In particular in this case where there was, again,  
24 knowledge of the contamination and now actual knowledge of the  
25 bankruptcy case. And so I think here, we sort of have your



1 classic contingent claim.

2 American Axle talked a little bit about Chateaugay,  
3 and I think Chateaugay is important, obviously, when we think  
4 about contingent claims generally, but Chateaugay was also  
5 important because it, you know, was really about environmental  
6 claims, claims of the EPA. And I just want to draw the Court's  
7 attention to a little bit of language from Chateaugay. It's at  
8 Page -- 944 F.2d 1005. And here, the Second Circuit says the:

9 "EPA does not yet know the full extent of the  
10 hazardous waste removal costs that it may one day  
11 incur and seek to impose upon LTV" --

12 -- that was the debtor --

13 -- "and it does not yet even know the location of all  
14 the sites at which such wastes may yet be found. But  
15 the location of these sites, the determination of  
16 their coverage by CERCLA, and the incurring of  
17 response costs by EPA are all steps that may fairly  
18 be viewed, in the regulatory context, as rendering  
19 EPA's claim 'contingent,' rather than as placing it  
20 outside the Code's definition of 'claim.'"

21 And I think that's really important to keep in mind  
22 here. Here, we have American Axle sort of arguing that, we  
23 didn't know in 2009 what the -- you know, that there would be  
24 response costs, what the response costs would be, and I think,  
25 you know, the Second Circuit in Chateaugay kind of tells us





1 that you still have to file your claim if you want to later  
2 seek recovery again. In particular here, there was actual  
3 knowledge of the contamination.

4 I think the cases that were cited in the reply missed  
5 the mark. A few of them were mentioned today. It was argued  
6 so far today that Old GM was the sole PRP. I think CERCLA kind  
7 of tells us that while Old GM may have been the only PRP that  
8 was, at that point, looked at for payment of some of these  
9 environmental remediation costs, every owner and operator was a  
10 potentially responsible party under CERCLA and applicable state  
11 law. I certainly think that sort of rings hollow. While  
12 American Axle argues that they were not aware of their CERCLA  
13 claim, it's been acknowledged in the papers and here today that  
14 they were aware of sort of the underlying contamination, and I  
15 think that's dispositive of the issue.

16 Just to sort of hit very briefly on a few of the  
17 cases that were mentioned today, the Chicago, Milwaukee,  
18 St. Paul & Pacific Railroad Company case, the Seventh Circuit  
19 case from 1992, I think American Axle wants to look to this  
20 case for the standard of, you know, the factors that should be  
21 considered, but I think it's also important to sort of read the  
22 rest of that case. In that case, the Seventh Circuit expressly  
23 stated:

24 "When a potential CERCLA claimant can tie the  
25 bankruptcy debtor to a known release of a hazardous



1 substance which this potential claimant knows will  
2 lead to CERCLA response costs, and when this  
3 potential claimant has, in fact, conducted tests" --  
4 -- I think here maybe there weren't tests conducted but there  
5 was actual knowledge --

6 -- "with regard to this contamination problem, then  
7 this potential claimant has, at least, a contingent  
8 CERCLA claim."

9 I think there's sort of similar language in the AM  
10 International case that was mentioned here today. I think in  
11 that case, the court ultimately actually followed Chateaugay,  
12 and I think that's sort of important. Both ownership and  
13 CERCLA were facts that were identified by that court as  
14 important things to think about when you're deciding whether  
15 something was fairly contemplated. And then, in the DMJ  
16 Associates case, the 2016 case from the Eastern District of New  
17 York, American Axle cites this case for the proposition that a  
18 claim hadn't -- didn't arise at the time that the creditor  
19 became aware of the contamination but rather when the CERCLA  
20 claim became available. I think in that case, it's important  
21 to know that there wasn't liability in that case because the  
22 relevant section of CERCLA had not yet been enacted. And so  
23 there couldn't have been any sort of fair contemplation because  
24 the statutory provision was not yet law. So I think with  
25 respect to those issues, the actual knowledge of the



1 contamination and CERCLA itself is dispositive of that issue.

2 I'll touch very briefly on Pioneer. The Pioneer  
3 standard is well known to the Court, and so I won't rehash it  
4 of the four factors. I think the factor that we're most  
5 focused on today is the reason for the delay. The motion  
6 itself, the reply, and I think that we've heard here today can  
7 be fairly characterized as American Axle sort of fundamentally  
8 misunderstanding when they had a claim and what that claim was.

9 This Court has noticed, has identified, has  
10 recognized before that a claimant's neglect is not excusable  
11 when its failure to comply with the rule of filing a claim by  
12 the bar date was the result of a mistake of law. And counsel  
13 argued here today that, you know, they just didn't think there  
14 was a contamination issue anymore. I think -- and essentially  
15 that there -- they didn't have a claim because they hadn't yet  
16 been asked to pay anything.

17 And I think the district court's opinion in Michigan  
18 Self-Insurers' Security Fund v. DPH Holdings is sort of  
19 instructive on this point. The claimant in that case was the  
20 Michigan Self-Insurers' Security Fund, and that was a fund that  
21 was created by state law essentially to pay for workers' comp.  
22 claims when the employer became insolvent. When the debtor in  
23 that case filed bankruptcy in 2005, it was current on its  
24 workers' comp. payments. It was current on its workers' comp.  
25 payments, you know, through the bankruptcy case, up to



1 confirmation. And in connection with confirmation in that  
2 case, the debtor essentially indicated that it was going to  
3 stop making its workers' comp. payments. And only at that  
4 point did the fund in that case essentially try to file two  
5 proofs of claim to address unpaid workers' comp. payments. The  
6 debtor objected to the claims because they were after the bar  
7 date. Then, the claimant in that case filed late claims  
8 motions, as you would. The debtor objected to those late  
9 claims motions too, essentially saying, you had these claims,  
10 they were contingent, you had these claims at the time of the  
11 bar date and you had to assert them. The bankruptcy court  
12 agreed, and Judge Scheindlin in the district court also agreed.

13           Essentially, that's the same excuses here. We -- I  
14 didn't think I had a claim because they were current on their  
15 payments, there was nothing for me to pay. And I think  
16 Judge Scheindlin's decision there is important to the issues  
17 that we're sort of considering here today. Even though the  
18 fund in that case had no right to payment because the debtor  
19 was still current at that time, same would go for American  
20 Axle, that there was always a risk that the debtor would stop  
21 making those workers' comp. payments. I think likewise,  
22 there's a risk -- there was always a risk that American Axle  
23 would be identified as a source of funds for, you know, paying  
24 for some of these environmental contamination costs. There was  
25 always a risk of that under CERCLA and applicable state law,



1 and so Judge Scheindlin recognized that the fund in that case  
2 made a mistake of law, and that was ultimately fatal to its  
3 motion to file a late claim.

4 And then, the final point that I will make is on the  
5 futility point. I think the reply brief and the argument here  
6 today essentially was that the claim shouldn't be disallowed  
7 because, A, there's no double-dip, which is sort of a policy,  
8 you know, idea behind whether or not 502(e)(1)(B) should be  
9 invoked, but also whether or not there was another claim that  
10 was actually filed, right, so whether there's actual  
11 co-liability in the sense of the bankruptcy claims. And I  
12 think with respect to that point, the APCO Litigation [sic]  
13 Trust case that we cite in our papers is relevant to that  
14 issue. In that case, whether the claim was actually filed is  
15 not the measure of whether or not 502(e)(1)(B) can be invoked  
16 but rather the mere existence of multiple claims. Again,  
17 whether or not they were asserted is not relevant to that  
18 analysis.

19 THE COURT: Thank you.

20 MS. ERBECK: That's all I have. Thanks, Judge.

21 THE COURT: Mr. Jones.

22 MR. JONES: Good morning, Your Honor. May it please  
23 the Court. Your Honor's question --

24 THE COURT: Just make your appearance for the record.

25 MR. JONES: Oh, sorry. David Jones with the U.S.



1 Attorney's Office for the United States, opposing the motion.

2           Your Honor's questioning, I think, revealed a quite  
3 fair grasp of our position, so I won't go on at length, but  
4 because of the motion's importance to the United States,  
5 especially the floodgates fear we have, which is very  
6 substantial -- let me just spell out the core of our position.  
7 The top line is -- what we're here for is to oppose any order  
8 that would in any way make RACER Trust responsible for this  
9 site. We take no position on the late motion -- late claim  
10 allowance portion of the motion.

11           First, as to the standing question that was briefly  
12 touched on, I -- that's not the main thing we're hanging our  
13 hat on because I think we have an overwhelmingly strong case as  
14 to why the consent decree shouldn't be modified on the merits,  
15 but I will pause to say that the Dunlop case on which American  
16 Axle relies recognizes that ordinarily to modify a consent  
17 decree, you have to be a party and to seek relief on that basis  
18 and -- but said that in narrow circumstances, which the Court  
19 emphasized were narrow, where a party is sufficiently close to  
20 the underlying dispute and directly affected by it, they could  
21 be allowed to seek such relief. As the Court's questioning  
22 also questioned -- I'm not at all convinced that's the case  
23 here because the purpose of RACER is for the specific purpose  
24 of cleaning up 89 listed and designated properties and is  
25 specifically not for cleaning up or providing recourse for



1 properties where GM might -- that GM didn't have any ownership  
2 interest in at the time of the petition. But -- so formerly  
3 owned properties were all consigned to the world of unsecured  
4 claims in this case, and that's where, you know, the Tonawanda  
5 Forge site at issue here belongs.

6           So -- and just to tease out a little bit why exactly  
7 that is, American Axle talks about RACER -- the fact that RACER  
8 did have certain responsibilities for non-owned sites. That  
9 was very limited. I think there were two specific cleanup  
10 obligations, one at Framingham, Massachusetts and one at the  
11 Upper Ley Creek portion of the -- a site near Syracuse called  
12 IFG Syracuse generally in our case. Both of those met criteria  
13 that were carefully explained in Docket Number 9311, which was  
14 our statement in support of the settlement, and specifically  
15 which something that American Axle hasn't acknowledged. What  
16 was necessary for those two sites to be included in RACER is  
17 that they were immediately adjacent to GM-owned properties that  
18 were very polluted and they were -- and GM, at the time of the  
19 petition, was subject to an order to clean those up, those  
20 adjacent properties, as part of its omnibus duty to remediate,  
21 under environmental laws, an area that included their own  
22 property and some -- and a spillover area. Again, that's not at  
23 all the case here. There was no order as, I think, American  
24 Axle agrees.

25           But for those narrow exceptions, unowned sites are



1 not RACER's responsibility. Again, that Docket Number 9311, at  
2 Pages 11 and 12, talks about the basis for including what's in  
3 the RACER Trust and its portfolio of responsibilities, and that  
4 same document at Pages 32 to 37 explains and justifies why  
5 other non-owned sites are not included in the RACER Trust. A  
6 number of objectors to the settlement said, me too, I should be  
7 covered by that, as well, and we said, no, so sorry, we  
8 sympathize with your problems, but, you know, the RACER Trust  
9 can only exist to serve a core set of estate obligations. And  
10 that's true -- that's important not only as a matter of  
11 prioritizing resources, but also because as a matter of law,  
12 debtors are obliged to fully fund and comply with their  
13 non-bankruptcy law obligations post-petition. That is the  
14 genesis of the obligation that led to the RACER Trust. So you  
15 have to clean and remediate your properties once you're  
16 post-petition to meet your administrative claim obligations and  
17 to meet your injunctive obligations. That's also true about  
18 areas where -- which you may not own but where you're subjected  
19 to orders. That doesn't apply to sites like the Tonawanda  
20 Forge site.

21           So that really is the heart of our position. Oh,  
22 I'll just say something that came up in colloquy today where  
23 the movant acknowledged that GM had largely remediated and  
24 contained any positive spillout from the facility it owned in  
25 that area is -- demonstrates that this is -- and explains why





1 this isn't that kind of property that could trigger RACER  
2 obligations. GM had already done the work to confine whatever  
3 contamination it had to its own property, and so there was no  
4 ongoing problem that the debtor could have been legally  
5 required to address and fix and that would have triggered and  
6 justified assignment to RACER.

7 Having drawn no questions, and I think that's the  
8 heart of my position, I think I'll stop talking. So thank you  
9 very much, Your Honor.

10 THE COURT: Thank you very much, Mr. Jones.

11 MR. JONES: We request that RACER not be -- have its  
12 mission diluted and that it be able to continue its good work.  
13 Thank you.

14 THE COURT: Thank you.

15 Mr. Blumenthal.

16 MR. BLUMENTHAL: Good morning. Michael Blumenthal  
17 from Thompson & Knight on behalf of the RACER Trust.

18 Your Honor, I will not belabor the record.  
19 Mr. Jones, who -- the U.S. Government is our beneficiary. I  
20 just want to point out two or three things. I think it's  
21 already been pointed out by Mr. Jones that the American Axle  
22 property is not adjacent to any of the 89 properties that were  
23 transferred by Old GM, which were owned by Old GM at the time  
24 they were being transferred, and that the only property -- or  
25 two properties that were included in the trust were adjacent to



1 the properties that were transferred to the trust and, more  
2 importantly, were specifically funded under the consent decree  
3 along with the other 89 properties. There's a budget for each  
4 property, Your Honor. The amount that was funded by the  
5 Government was not a gross amount just, here, go remediate 89  
6 properties. It was specific funding for each property. We are  
7 not allowed to take from one property for another. It would  
8 violate the consent decree. And I think Your Honor may have  
9 hit upon an important point, that --

10 THE COURT: Accidents happen sometimes.

11 MR. BLUMENTHAL: Yes, Your Honor. The settlement --  
12 the consent decree and settlement agreement was an agreement  
13 among 14 states, the U.S. Government, and the Mohawk tribe, not  
14 with properties owners, and it settled the proofs of claim that  
15 were filed by the various governmental agencies. It was only  
16 for properties that Old GM owned at the time.

17 This particular property is adjacent to a New GM  
18 facility, not ours. There is absolutely no funding. This  
19 property was not owned by Old GM at the time of the petition  
20 date and, moreover, has in excess of \$4 million of liens  
21 against it. Under the consent decree, the properties that were  
22 transferred into the trust were transferred in free and clear.  
23 The -- as we indicated in the final paragraph of our objection,  
24 I'll call it a limited response, the only way that you could  
25 even consider this is sending notice out to 14 attorney



1 generals of the various states, the Mohawk tribe, and our  
2 beneficiary, and somehow come up with third-party funding and  
3 somehow release the liens from the property and transfer the  
4 property in. Those circumstances are not about to happen or  
5 occur. There would be a floodgate of litigation over that  
6 issue.

7           The trust has a specific -- has specific authority to  
8 do only what it is authorized to do. We cannot take on  
9 additional properties. We're not allowed to. And this really,  
10 Your Honor, boils down, at this point in time, to a two-party  
11 dispute between two non-debtors, New York State and American  
12 Axle. It has nothing to do with the trust or Old GM anymore.

13           THE COURT: Thank you.

14           MR. BLUMENTHAL: Thank you.

15           THE COURT: All right. Mr. Stravino, very briefly.

16           MR. STRAVINO: Yes, Your Honor, briefly.

17           First, with respect to the GUC Trust arguments and  
18 the citation to Chateaugay, again, at that point in time, the  
19 critical distinction in that case between ours is that there  
20 already was environmental remediation going on. There was not  
21 in ours at the time of the filing.

22           With respect to the DMJ case that was cited from the  
23 Eastern District of New York from 2016, it was noted that  
24 CERCLA's private cause of action under Section 107 arose in  
25 2007. But the sentence before that said, quote:



1 "Here, the third-party plaintiffs lacked knowledge as  
2 to the existence of any claim whatsoever at the time  
3 RCPA filed for bankruptcy protection."

4 So I believe, Your Honor, that was the principal  
5 analysis by the court that it did not exist at the time, and we  
6 have cited in our papers various cases about when CERCLA claims  
7 actually become available.

8 With respect to the workers' compensation case, if an  
9 environmental remediation was ongoing and was being funded and  
10 GM filed for bankruptcy, then I could understand how you would  
11 say we should file a proof of claim because they may not be  
12 able -- just like the workers' comp. that was being funded and  
13 there was a bankruptcy. But, Your Honor, that's not the case  
14 here. Again, upon information and belief, even to the best of  
15 our knowledge and, I assume -- I can't speak on behalf of the  
16 State of New York, they didn't put in papers, but this was not  
17 one of their 21 proofs of claim. They did not think there was  
18 an issue here.

19 Furthermore, we did not argue this earlier, but in  
20 terms of when -- there had been -- the GUC Trust had taken a  
21 position in the Gillespie matter where Mr. Gillespie was -- in  
22 the 2017 decision, Mr. Gillespie was a former -- Your Honor's  
23 familiar with the case.

24 THE COURT: I'm familiar with Mr. Gillespie.

25 MR. STRAVINO: Yes. And they said that his claim did



1 not arise until his conviction was overturned or reversed in  
2 2012. And so respectfully, Your Honor, we believe that  
3 supports our position here. So with respect to the workers'  
4 compensation and that matter --

5 THE COURT: What did I rule in Gillespie?

6 MR. STRAVINO: Your Honor, that was -- you were not  
7 favorable to us or to Mr. Gillespie, so acknowledged. I'm just  
8 saying what the --

9 THE COURT: I don't think you're getting any mileage  
10 out of the Gillespie decision. Let's put it that way.

11 MR. STRAVINO: Okay. Well, I'll move on. I'll take  
12 that as a -- and briefly, Your Honor, with respect to Mr. Jones  
13 saying that we thought that the -- I'll say "contamination" --  
14 had already been contained. I believe that's correct, but we  
15 don't know, and now there's a question with respect to the  
16 site. We also thought that the entire site had been  
17 remediated.

18 So -- and finally with respect to Mr. Blumenthal  
19 saying that there would be a floodgate of litigation, I'm not  
20 sure if we know that or could predict that, especially this  
21 number of years later. If this was very soon thereafter --

22 THE COURT: Who thought American Axle was going to  
23 come forward this many years later.

24 MR. STRAVINO: Right. And we thought -- you're  
25 right. We thought New York State would come after American



1 Axle. But respectfully, Your Honor, we appreciate the Court's  
2 time and consideration. We rely on the arguments and our  
3 papers. We think the equitable result here is to both be  
4 included in the RACER Trust or, in the alternative, to be able  
5 to adjudicate the --

6 THE COURT: All right. I'm going to take the matter  
7 under submission. We're going to be in recess for about five  
8 minutes, ten minutes, and then we'll resume on the next matter.  
9 Thank you very much everybody.

10 UNIDENTIFIED: Thank you.

11 MR. STRAVINO: Thank you.

12 (Proceedings concluded at 10:55 a.m.)

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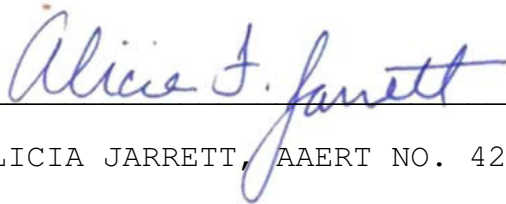
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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
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ALICIA JARRETT, AAERT NO. 428

DATE: March 11, 2019

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